Supreme Court, U.S.
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No. 93-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WASHINGTON SUBURBAN SANITARY COMMISSION,
Petitioner,

v.

CAE-LINK CORPORATION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petition should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257 for want of a "final judgment."

2. Whether the Court of Appeals of Maryland correctly held that the Maryland common law of nuisance is not pre-empted by certain federal court orders.

3. Whether the Court of Appeals of Maryland correctly interpreted this Court's decision in International Paper Co. v. Ouellette, 479 U.S. 481 (1987) in holding that the Maryland common law of nuisance is not pre-empted under the circumstances of this case by the Water Pollution Control Act.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the U.S. Supreme Court Rules of Practice and Procedure, the parent companies and subsidiaries (other than wholly-owned subsidiaries) of each respondent are as follows:

1. **CAE-Link Corporation**

   The parent company of CAE-Link Corporation is CAE-Link Holdings Company. There are no subsidiaries of CAE-Link Corporation other than wholly-owned subsidiaries.

2. **International Fabricare Institute**

   International Fabricare Institute has no parent company or subsidiaries.

3. **AT&T Resource Management Corporation**

   The parent company of AT&T Resource Management Corporation is American Telephone and Telegraph Company. AT&T Resource Management Corporation has no subsidiaries.

4. **The Washington Post Company**

The Washington Post Company has no parent company. Its non-wholly-owned subsidiaries are Kingdom Cable Vision Limited, Scotcable (Motherwell) Limited, Tayside Cable Systems Limited, ACTV Interactive Company, Moffet, Larson, Johnson, Inc., American PCS, L.P., Bowater Mersey Paper Company Limited, Capitol Fiber, Inc., I.H.T. Corporation, International Herald Tribune, S.A., Los Angeles Times-Washington Post News Service, Inc., Bear Island Paper Company and Bear Island Timberlands Company.

5. **Erie Indemnity Company**

Erie Indemnity Company has no parent company. Its only non-wholly-owned subsidiary is Erie Family Life Insurance Company.

6. **BancTec USA, Inc.***

The parent company of BancTec USA, Inc. is BancTec, Inc. BancTec USA, Inc. recently changed its name (April 23, 1993) from BancTec Systems, Inc. There are no subsidiaries of BancTec USA, Inc.

* Respondent BancTec USA, Inc. was omitted altogether in the List of the Parties set forth in the Petition.

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In The

Supreme Court of the United States

October Term, 1993

WASHINGTON SUBURBAN SANITARY COMMISSION,
Petitioner,

v.

CAE-LINK CORPORATION, et al.,
Respondents.

Petition for Writ of Certiorari to
the Court of Appeals of Maryland

JOINT BRIEF IN OPPOSITION

Respondents (counter-plaintiffs below) respectfully submit that the Petition should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257 for want of a "final judgment." Alternatively, the Petition should be denied because the Court of Appeals of Maryland was correct in finding no pre-emption of the Maryland common law

of nuisance under the circumstances of this case and because there are no special or important reasons to grant certiorari.

STATEMENT REGARDING LACK OF JURISDICTION

As respondents explain more fully below, this Court should dismiss the Petition for lack of jurisdiction under 28 U.S.C. §1257, because there has been no "final judgment."

ADDITIONAL STATUTORY PROVISION

28 U.S.C. §1257(a). State courts; certiorari

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution

or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The Washington Suburban Sanitary Commission ("WSSC") commenced this declaratory judgment action in 1980 against various property owners in the Montgomery Industrial Park. WSSC had condemned a large parcel there for the construction and operation of a sewage sludge composting facility in contravention of certain covenants running with the land, and WSSC sought a declaration that it was not required to compensate the beneficiaries of the covenants for the value of those intangible property rights. The defendant property owners, none of whom had been named in the condemnation action, filed counterclaims against WSSC for monetary damages for inverse

condemnation, breach of their covenant rights and common law nuisance, among other things.

WSSC moved for partial summary judgment on the counterclaims, and the trial court denied that motion as to the counterclaims for inverse condemnation and breach of the covenants. As to the count for common law nuisance, the trial court granted partial summary judgment to the extent of requiring, contrary to established Maryland law, that respondents prove that WSSC was negligent.

A jury trial was held in March, 1991. At the outset, the counterclaims for breach of covenant were dismissed voluntarily, based upon a stipulation by the parties that the covenants had been extinguished in July 1980 as a result of the condemnation of the land. At the

end of the respondents' case in chief, WSSC moved for judgment (the Maryland equivalent of a motion for directed verdict). The trial court denied that motion as to the claims for inverse condemnation but granted the motion as to the nuisance count. At the conclusion of all of the evidence, the jury found in favor of WSSC on the claim for inverse condemnation.

Respondents appealed to the Court of Special Appeals of Maryland on numerous grounds. That court reversed the trial court's ruling on the motion for judgment that respondents had to prove negligence in support of their claims for nuisance. The Court of Special Appeals also reversed the judgment entered on the jury verdict on the inverse condemnation claims because of prejudicial error by the trial court in

certain evidentiary rulings and in the jury instructions.

WSSC then appealed to the Court of Appeals of Maryland, which affirmed the decision of the Court of Special Appeals in all respects and remanded the case for a new trial on both the nuisance claims and inverse condemnation claims. WSSC then petitioned this Court for a Writ of Certiorari to the Court of Appeals of Maryland.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION UNDER 28 U.S.C. §1257 BECAUSE THERE IS NO "FINAL JUDGMENT."

Under 28 U.S.C. §1257, this Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." In the instant case, the Court of Appeals of Maryland has remanded the case to the Circuit

Court for Montgomery County, Maryland for a new trial on the merits on both the nuisance and inverse condemnation claims. There are only a limited set of circumstances in which this Court has found finality as to a federal issue despite the ordering of such further proceedings in the lower state courts. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-87 (1975). This case does not fit into any of those four categories.

First, the federal issue raised in the Petition is not conclusive and, indeed, has no bearing at all on the inverse condemnation claims. Therefore, a new trial must be had, regardless of the disposition of the matters raised in the Petition. Secondly, there is the possibility that, upon the retrial, the jury may find on unrelated grounds that

WSSC has no liability for the common law nuisance claims, in which case the federal issue raised in the Petition would not need to be reached. Third, in the event that respondents prevail on the nuisance claims before the jury, later review of the federal issue still may be had and will not be mooted. Finally, even if WSSC were to prevail on the nuisance claims on non-federal grounds, a refusal to review the decision of the Court of Appeals of Maryland immediately on the federal issue will not "seriously erode federal policy." Accordingly, the Petition should be dismissed for want of jurisdiction. See O'Dell v. Espinoza, 456 U.S. 430 (1982) (Petition dismissed where Colorado Supreme Court had remanded case for trial and, therefore, decision was not final).

II. THE COURT OF APPEALS OF MARYLAND CORRECTLY HELD THAT THE MARYLAND COMMON LAW OF NUISANCE IS NOT PRE-EMPTED BY THE FEDERAL COURT ORDERS.

As the Court of Appeals of Maryland confirmed in its decision, "Maryland has long adhered to the rule that proof of nuisance focuses not on the possible negligence of the defendant but on whether there has been unreasonable interference with the plaintiff's use and enjoyment of his or her property." Pet. App. A at 9a. In fact, as the Court of Appeals noted, WSSC had conceded that, in Maryland, "nuisance is a matter of strict liability." Id. However, WSSC had asked the Court of Appeals to sanction an exception to this rule, premised upon the supposed unfairness to WSSC because it was required to comply with certain federal court orders mandating the construction

of the facility. The Court of Appeals refused to do so, noting that the federal court had not selected the site nor had it mandated how construction would proceed. Pet. App. A at 14a. WSSC was solely responsible for the development of the facility, and "[w]hile the district court expedited the construction, it was the petitioner that created the nuisance. A strict liability standard should apply." Id at 14a-15a.1/

Faced with an adverse result under long settled Maryland law, WSSC attempted to fashion a novel variation

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1/ The Court also referred to evidence in the record that it was WSSC that had requested the district court to order it to acquire the land for the facility. Pet. App. A at 14a-15a, n.8. Accordingly, WSSC, far from being a helpless recipient of a federal court order, played a substantial role in obtaining the federal district court orders that it has characterized as coercive. Id.

of the federal pre-emption doctrine,[2] asserting that the federal court orders referenced in the Petition pre-empted Maryland law and that a finding of such pre-emption is warranted because it was impossible for WSSC to comply with both the federal court orders and Maryland law. Pet. App. A at 16a.

At the outset, WSSC has never provided any authority for the proposition that federal court orders can pre-empt state law. Pre-emption refers to the invalidation of state laws that interfere with or are contrary to "the laws of Congress". Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2481 (1991). In other words,

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[2] Although WSSC had raised the issue of a supposed conflict between the federal court orders and Maryland nuisance law in the trial court during the summary judgment proceedings, it did not cast this argument in terms of the pre-emption doctrine until the appellate level.

pre-emption is designed to carry out Congressional intent, as manifested in federal statutes and regulations. See, e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981).[3/]

Additionally, WSSC concedes, as it must, that the Maryland common law which it claims is pre-empted did not prohibit or obstruct WSSC from building or operating the composting facility. Instead, WSSC contends that the potential imposition of monetary damages under state tort law is an improper intrusion of state law into an area subject to exclusive or federal regulation. Pet. at 13-15. Apparently, WSSC seeks to come within that category

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3/ The Court of Appeals of Maryland duly noted this point, and its discussion of pre-emption by federal court orders was based entirely on an assumption, arguendo, that such orders can trigger pre-emption. Pet. App. A at 18a.

of cases in which pre-emption is found to exist because state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." English v. General Electric Co., 496 U.S. 72, 79 (1990). WSSC's argument is flawed for a number of reasons. First, as discussed above, there is no authority for the notion of pre-emption by federal court orders. Secondly, the cases cited by WSSC in support of this proposition are not apposite. Those cases concern situations in which state law damages actions were brought regarding conduct prohibited or arguably prohibited by a comprehensive scheme of federal regulation. See, e.g., San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) (reversing damages awarded in state court in connection

with union activities subject to National Labor Relations Act ("NLRA")); Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc., 475 U.S. 282 (1986) (NLRA pre-empted Wisconsin statute directed at enforcing requirements of NLRA); Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (state law claims for damages stemming from a carrier's negligence and tort pre-empted when same matters were intended by Congress to be and, in fact, were addressed by the Interstate Commerce Commission). In contrast, in the instant case, the Maryland common law nuisance claims asserted against WSSC are not based on the type of conduct regulated by the Water Pollution Control Act (the "Act"). The claims arise not from a water pollution problem but from

offensive odors generated by the plant. In other words, the claims in this case do not even relate to the activity regulated by the federal statute offered by WSSC as the basis for its pre-emption claim. Thirdly, as discussed more fully in Section III below, this Court's decision in International Paper Co. v. Ouellette, 479 U.S. 481 (1987) expressly preserved common law claims for nuisance against a facility subject to the Act under the law of the source state, here Maryland. Based on all of these reasons and, particularly given the strong presumption against pre-emption, Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2620-21 (1992), there is no merit to WSSC's position.

III. THE COURT OF APPEALS OF MARYLAND CORRECTLY INTERPRETED APPLICABLE FEDERAL LAW IN HOLDING THAT THE MARYLAND COMMON LAW OF NUISANCE IS NOT PRE-EMPTED BY THE WATER POLLUTION CONTROL ACT UNDER THE CIRCUMSTANCES OF THIS CASE.

WSSC's second asserted reason for granting the petition rests upon a fundamental misreading of this Court's opinion in International Paper Co. v. Ouellette, 479 U.S. 481 (1987). In that decision, this Court construed the "savings clause" in §1365(e) of the Act as not precluding possible pre-emption of some provisions of state law by sections of the Act other than §1365. Specifically, this Court ruled that subjecting a polluting "point source" in one state to liability under the law of another "affected" state would interfere with Congressional objectives underlying the Act. Such claims against a polluter in one state under the laws of other

affected states therefore were held pre-empted. 479 U.S. at 493-94. However, as this Court specifically held in Ouellette,

> Nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State . . . [Milwaukee v. Illinois, 451 U.S. 304, 328 (1981)] [suggesting that "States may adopt more stringent limitations . . . through state nuisance law, and apply them to in-state dischargers") . . .

479 U.S. at 497 (emphasis in original). Accordingly, claims regarding this Maryland composting facility under Maryland nuisance law are not pre-empted.

In Ouellette, this Court held that the savings clause does not preclude pre-emption of state law by other provisions of the Act. That ruling cannot be fairly construed to suggest that such pre-emption is mandated. In fact, according to Ouellette, nuisance

claims pursuant to the law of the source state are preserved. Id. at 197. WSSC simply has not read carefully either the savings clause or Ouellette.

The Court of Appeals of Maryland correctly interpreted Ouellette. Ouellette does not support WSSC's claim. To the contrary, Ouellette confirms that the prosecution of claims such as those in the instant case is permissible.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

July 30, 1993 Respectfully submitted,

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